Supreme Court, U.S.
FILED
AUG 14 2002
OFFICE OF THE CLERK

(3)

No. 01-1773

IN THE

Supreme Court of the United States

JOSEPH L. COLE,
TRUSTEE OF THE STANFORD FARMS TRUST,
Petitioner,

v.

COUNTY OF SANTA BARBARA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the California Supreme Court

REPLY BRIEF OF PETITIONER

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August 14, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

15 pp

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REPLY BRIEF OF PETITIONER

Petitioner seeks review of a California procedural bar that shields from review, and thereby effectively condones, flagrant evasions of the constitutional restrictions this Court has placed on the use of local zoning powers to take private property without compensation. In this case, that procedural bar allowed respondent to take a 77,000 square-foot easement that is wildly disproportionate to the modest addition to which the easement is tied, and for which respondent will never pay a penny in compensation. Indeed, in its opposition, respondent nowhere even suggests that its appropriation of this massive easement remotely satisfies the requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

Instead, respondent seeks to shield its unconstitutional conduct from review by claiming that the very procedural bar petitioner is challenging constitutes an adequate and independent state law ground that deprives this Court of jurisdiction. This contention is utterly baseless. In adopting its procedural bar, the lower court necessarily decided two questions of federal constitutional law – *i.e.*, (1) that no legally distinct property deprivation occurs when a state entity accepts a coerced offer to dedicate an easement (even though, as respondent concedes, it is only acceptance of the offer that extinguishes a property owner's fundamental right to exclude others from the property), and (2) that a takings challenge for loss of the right to exclude others is ripe when an offer to dedicate an easement is first coerced (even though, at the time of the coercion, no state entity has made a final decision to deprive the owner of this right and the deprivation may never occur). The lower court erred in resolving both of these questions of federal law, and this Court plainly has jurisdiction to review and correct those errors.

Respondent's fallback arguments – that the decision below is correct and in any event raises no important issues – are equally without merit. Respondent itself concedes that the Trust did not lose its right to exclude others from its property until the County accepted the offer to dedicate in 2000 – a concession compelled by California law, and fatal to respondent's claim that the takings claim petitioner asserted was ripe in 1980. The lower court's erroneous disposition of petitioner's claim, moreover, allowed respondent to appropriate property in flagrant violation of this Court's rulings in *Nollan* and *Dolan*. Unless this Court grants this petition, moreover, hundreds of similarly situated property owners will suffer similar deprivations of their constitutional rights. At the end of the day, respondent's opposition serves only to confirm that this Court should review and reverse the decision below.

1. Contrary to respondent's claim, the procedural bar the court of appeal adopted is not an adequate and independent state law basis for the decision below. Rather, in adopting that bar, the lower court indisputably (and incorrectly) resolved two questions of federal takings law – *i.e.*, when does a compensable deprivation of property occur, and when is a challenge to such a deprivation ripe? The procedural bar the lower court invoked, therefore, is inextricably linked to the merits of petitioner's takings claim, and this Court plainly has jurisdiction to determine the propriety of that bar. See, *e.g.*, *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 487 (1989) (Brennan, J., dissenting) (where state and federal law issues "are thoroughly intertwined," the state-court judgment "cannot be said to rest on an 'adequate and independent state ground' so as to bar review by this Court").

In upholding dismissal of this suit as an untimely and improper collateral attack on the California Coastal Commission's original permit decision, the court of appeal necessarily rejected petitioner's argument that, as a matter of

federal takings law, respondent's decision to accept the offer to dedicate worked a legally distinct deprivation of property for which respondent either must pay compensation or demonstrate compliance with the requirements of *Nollan* and *Dolan*. In addition, the court of appeal expressly rejected petitioner's argument that, as a matter of federal law, any challenge to this legally distinct deprivation was unripe, and thus could not have been brought within 60 days of the Coastal Commission's original permit decision. See Opp. 13a. Thus, in adopting its procedural bar, the lower court ruled on petitioner's federal constitutional claims. Where, as here;

> "resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded.[] In such a case, the federal-law holding is integral to the state court's disposition of the matter, and [a] ruling [by this Court] on the issue is in no respect advisory."

Int'l Longshoreman's Ass'n v. *Davis*, 476 U.S. 380, 388 (1986) (quoting *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985)).

The state law cases respondent cites in an attempt to demonstrate otherwise, see Opp. 8-10, are inapposite. None involved a challenge to a state entity's acceptance of an offer to dedicate an easement. Rather, the only state actions at issue in those cases were permit decisions.[1] The courts had

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[1] *See Cal. Coastal Comm'n* v. *Superior Court*, 258 Cal. Rptr. 567 (Cal. Ct. App. 1989) ("*Ham*") (post-*Nollan* action seeking to set aside permit condition requiring offer to dedicate property in exchange for permit); *Rossco Holdings, Inc.* v. *State*, 260 Cal. Rptr. 736 (Cal. Ct. App. 1989) (same); *Patrick Media Group, Inc.* v. *Cal. Coastal Comm'n*, 11 Cal. Rptr. 2d 824 (Cal. Ct. App. 1992) (inverse condemnation action by billboard owner seeking compensation for off-site billboards that the owner's lessor removed in order to comply with a permit); *Ojavan Investors, Inc.* v. *Cal. Coastal Comm'n*, 32 Cal. Rptr. 2d 103 (Cal. Ct. App. 1994) (action challenging permit conditions that required the owner's predecessor-in-

no need to decide any question of federal law in these cases; instead, they simply accepted allegations that permit conditions had caused property deprivations, or were otherwise invalid, and concluded that the time for challenging the permit decisions had expired.

This case, in stark contrast, involved two state actions – a permit decision that indisputably did *not* deprive Bushkin or the Trust of the right to exclude others from the subject beach property, and respondent's acceptance, nearly 20 years later, of the compelled offer to dedicate an easement, which *did* strip the Trust of this property right. Petitioner's claims that respondent's acceptance gave rise to a compensable property deprivation, and that any challenge to that deprivation would have been unripe in 1980, required the lower court to decide two questions of federal law that simply were not at issue in the cases respondent cites. Accordingly, application of the procedural bar the lower court invoked is inextricably tied to the court's resolution of federal questions, and this Court has jurisdiction to review the decision below.[2]

2. Respondent's arguments on the merits fare no better.

a. In response to petitioner's taking claim, respondent contends, first, that the lower court simply made a "factual

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interest to record development restrictions on building sites, including a dedication of an easement); *County of Imperial* v. *McDougal*, 564 P.2d 14 (Cal. 1977) (action challenging a condition in a special permit granted to predecessor in title); *City of Santee* v. *Superior Court*, 279 Cal. Rptr. 22 (Cal. Ct. App. 1991) (action seeking declaration that permit conditions that landowner had accepted were invalid); *Pfeiffer* v. *City of La Mesa*, 137 Cal. Rptr. 804 (Cal. Ct. App. 1977) (inverse condemnation action seeking to recover damages allegedly caused by compliance with permit condition that landowner accepted and never challenged).

[2] For these same reasons, there is no merit to respondent's suggestion that petitioner seeks to use the requirements of *Nollan* to evade state law principles of res judicata and waiver. Unlike the property owners in *Ham* and *Rossco Holdings*, petitioner challenges respondent's decision to accept an offer to dedicate an easement, and he brought that challenge well within the 60-day period prescribed by California law.

finding" that petitioner did not actually challenge the County's acceptance as a legally distinct property deprivation. Opp. 16. But the court of appeal's holding that "the validity of the permit condition underlies all of the causes of action," Pet. 12a, is a *legal* conclusion, not a finding of fact. Both the Coastal Commission's decision to require the offer to dedicate and respondent's acceptance of that offer suffer from the same constitutional defect – neither entity demonstrated that there was any nexus between the compelled easement and the project to which it was tied. Because petitioner emphasized that the County could not properly accept the offer in light of this defect, the lower court concluded that petitioner's claim was in substance a collateral attack on the permit condition itself.

This legal ruling is manifestly wrong. As petitioner has demonstrated, and respondent nowhere disputes, the County's acceptance decision is logically and legally distinct from the permit decision. The Coastal Commission's permit decision did not require the County to accept the offer to dedicate. See *Grupe* v. *Cal. Coastal Comm'n*, 212 Cal. Rptr. 578, 592 (Cal. Ct. App. 1985) (noting unlikelihood that a public agency would actually accept the offer to dedicate at issue in that case). In making the purely discretionary decision to accept the offer, moreover, the County had an independent duty to respect the constitutional rights of property owners. Its decision to accept an easement that was patently inconsistent with the requirements of *Nollan* and *Dolan*, therefore, is a legally separate governmental act that caused an injury that the original permit decision did not, by itself, cause.

Second, respondent argues that petitioner's "theory" that the County's acceptance is a separate taking is based on a misreading of California law. Opp. 16. But respondent itself repeatedly acknowledges, as it must, that the Trust did not lose the right to exclude others from its property until the County accepted the offer to dedicate. Thus, the County concedes that "[o]nce the landowner records an irrevocable

offer of dedication, he has conveyed away the right to exclude the public *should the irrevocable offer ever be accepted*." *Id.* (emphasis added).[3] Similarly, respondent acknowledges that the owner of property subject to an offer to dedicate retains the "right to exclude others while the irrevocable offer of dedication is outstanding," and that this right is "subject to immediate extinction *once the agency accepts the offer*." *Id.* at 17 (emphasis added).

These concessions are dictated by California law, which unambiguously provides that, when an offer to dedicate an easement is made, the public does not thereby "acquire any right to an easement." *People* v. *Williams*, 2 P. 393, 396 (Cal. 1884). "A dedication without acceptance is, in law, merely an offer to dedicate, and such offer *does not impose any burdens nor confer any rights*," unless there is an acceptance. *City of Santa Clara* v. *Ivancovich*, 118 P.2d 303, 307 (Cal. Ct. App. 1941) (emphasis added); see also *Grupe*, 212 Cal. Rptr. at 592 (an offer to dedicate "will become effective *only* if accepted" and, until accepted, "there is no easement"); *Baldwin* v. *City of L.A.*, 83 Cal. Rptr. 2d 178, 187 (Cal. Ct. App. 1999) (unconditional acceptance is required to complete a dedication). Accordingly, the owner of property subject to an offer to dedicate "can exclude the public from the privately owned portion of his beach until such time as a public agency . . . agrees to accept the offer and the concomitant responsibility to police the beach." *Grupe*, 212 Cal. Rptr. at 592. See also *Whalers' Village Club* v. *Cal. Coastal Comm'n*, 220 Cal. Rptr. 2, 15 (Cal. Ct. App. 1985).

In light of this well-settled law, there is no basis whatsoever for respondent's assertion that "acceptance of the irrevocable offer of dedication is not a taking of a landowner's property right," Opp. 17, or for the Ninth Circuit's equally erroneous

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[3] This concession is compelled by the offer itself, which provides that it grants an easement only "'[u]pon recordation *of an acceptance of this Offer by the Grantee*.'" *See* Opp. 16 (emphasis altered) (quoting offer).

conclusion that acceptance of an offer to dedicate takes nothing "that had not already been taken" when the property owner was compelled to record the offer. *Daniel* v. *County of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002), *pet. for cert. filed*. No. 02-107 (U.S. July 17, 2002). Prior to acceptance, the Trust retained "one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Acceptance indisputably took that very right from the Trust. Analogizing an offer to dedicate to an options contract, see Opp. 17, does not and cannot alter this central fact: whatever right an offer to dedicate confers on a public agency, it is the public agency's *exercise* of that right, not the owner's *conferral* of that right, that divests the property owner of the fundamental right to exclude others.[4]

Finally, nothing in *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003 (1992), supports respondent's claim that acceptance of the offer to dedicate worked no deprivation of property. In *Lucas* the Court noted that exercise of a *previously granted easement* would not constitute a separate taking. See *id.* at 1028-29 ("we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title"). *Lucas* was careful to note,

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[4] Respondent's suggestion that the California law upon which petitioner relies concerns revocable rather than irrevocable offers, Opp. 18, is simply untrue. In *Grupe*, for example, the property owner was required to record a document "'*irrevocably offering to dedicate* . . . an easement for public access and passive recreational use along the shoreline.'" 212 Cal. Rptr. at 581 (emphasis altered) (quoting offer). In all events, there is no meaningful distinction between a revocable offer to dedicate and an irrevocable offer that expires if not accepted within a prescribed period of time. Just as acceptance prior to revocation of a revocable offer to dedicate is necessary to strip a property owner of the right to exlcude others, so too here, acceptance prior to the expiration of the offer Bushkin recorded was necessary to strip the Trust of its right to exclude others from its property.

however, that there is no taking only when an antecedent inquiry into the nature of a property owner's estate reveals that "the proscribed use interests were not part of [the landowner's] title to begin with." See *id.* at 1027. By contrast, here mere recordation of the offer to dedicate did not limit the Trust's ability to exclude others.

b. Respondent's contention that the Trust's taking claim was ripe in 1980, when Bushkin was first required to record an offer to dedicate, Opp. 19, fails for the same reason. Indeed, this contention is completely inconsistent with respondent's own concession that no easement was created in the Trust's property until the County accepted the offer to dedicate in 2000 – a concession which, as just noted, is compelled by California law. Contrary to respondent's claim, moreover, *Nollan* does not demonstrate that a ripe claim exists once a government entity imposes conditions on a permit. In arguing otherwise, respondent ignores the critical fact that the landowner in *Nollan* was required to record an easement, not an offer to dedicate an easement. Thus, in *Nollan*, compliance with the permit condition would have worked an immediate deprivation of the right to exclude others from the property. Here, no such deprivation occurred until respondent accepted the offer to dedicate in 2000.

Nor does respondent offer any response to petitioner's showing that the court of appeal's erroneous ripeness determination would allow a recording landowner to obtain an undeserved windfall. If a taking associated with the acceptance of an offer to dedicate an easement were to ripen at the time an offer was recorded, the landowner at that time would be entitled to compensation for the full value of a property loss that might never materialize, or, as happened in this case, that might be suffered by a subsequent property owner. The creation of such windfalls demonstrates that it is not "pointless" to consider when a property owner may assert a ripe takings challenge to an appropriation of property that is effectuated through two governmental steps rather than one.

3. Finally, respondent's claim that this case raises no important issues of federal law is, at best, unpersuasive, and, at worst, cynical. Nowhere in its opposition does the County attempt to refute petitioner's showing that the appropriation of the Trust's property was undertaken in flagrant violation of this Court rulings in *Nollan* and *Dolan*. Nor does respondent deny that the Coastal Commission is urging agencies throughout the State to accept hundreds of other soon-to-expire offers to dedicate with full knowledge that virtually none of the resulting easements could satisfy the requirements of the Fifth Amendment. Such open flouting of this Court's rulings is itself an important reason to grant review.

Nor is there the slightest merit to respondent's incredible assertion that the hundreds of other similarly situated property owners will likely welcome confiscation of their property by local governments. *Id.* at 13. The retaliatory tactics the Coastal Commission employed against petitioner in this case,[5] coupled with the California Supreme Court's decision to leave the decision below undisturbed, ensures that few if any landowners will have the temerity to contest appropriations of easements across their property, no matter how egregious the resulting constitutional violation. Thus, the absence of challenges like the one petitioner has mounted is not evidence that property owners do not object to the unconstitutional appropriation of their property, but merely confirms that the Coastal Commission and local governments are succeeding in thwarting the requirements of *Nollan* and *Dolan*. These entities will only be further emboldened if this Court denies the petition. Moreover, the decision below provides a clear roadmap that other States can use to escape this Court's holdings in *Nollan* and *Dolan*.

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[5] The Coastal Commission took the extraordinary step of threatening petitioner personally (not as Trustee) with fines totaling millions of dollars. Under the threat of this severe penalty, petitioner entered into a settlement agreement, whereby the Trust paid $460,000 on the understanding that the funds would be used for an environmental project.

For these same reasons, the absence of a conflict in the lower courts provides no basis for ignoring the blatant violation of constitutional rights that occurred in this case. See *id.* at 12. Local governments have only recently begun accepting the offers to dedicate that the Coastal Commission coerced decades ago, and the Commission has made an example of petitioner to all others who might seek to fight acceptance of such offers. The fact that the Ninth Circuit rejected the only other takings claim to reach an appellate court underscores the need for this Court's review. The Ninth Circuit's decision in *Daniel* suffers from the same flawed reasoning as the decision below, and has closed off the only other avenue for preventing wide-scale defiance of *Nollan* and *Dolan*. Indeed, the decision in *Daniel* is also the subject of a petition for a writ of certiorari before this Court. See Petition for a Writ of Certiorari, *Daniel* v. *County of Santa Barbara*, No. 02-107 (U.S. filed July 17, 2002).[6] Absent this Court's intervention, government entities across California will be free to accept hundreds of soon-to-expire offers to dedicate property, coerced in blatant violation of the Constitution, and government entities in the other eight states within the Ninth Circuit will be able to follow suit. .

CONCLUSION

This Court should grant the petition for certiorari.

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[6] Petitioners have no objection to the consolidation requested in *Daniel* v. *County of Santa Barbara*, No. 02-107 (U.S. filed July 17, 2002), should the Court decide to grant the *Daniel* petition as well.

Respectfully submitted,

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